No. 73-477

In the Supreme Court of the United States

OCTOBER TERM, 1974

GERSTEIN,

Appellant,

v.

PUGH,

Appellee.

Appeal from the United States Court of Appeal, for the Fifth Circuit

ORIGINAL BRIEF AMICUS CURIAE FOR THE STATE OF LOUISIANA

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana,
Baton Rouge, Louisiana 70804.

WALTER L. SMITH, JR.,
Assistant Attorney General,
State of Louisiana,
Baton Rouge, Louisiana 70806.

Attorneys for Amicus Curiae.

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This brief amicus is presented on behalf of the State of Louisiana.

STATEMENT OF FACTS

This is a class action seeking relief for alleged deprivation of rights under the Fourth and Fourteenth Amendments. Plaintiffs were incarcerated upon information filed by the state attorney and held for trial without review by a committing magistrate of the probable cause for their arrest. The plaintiffs thus contend that they have been deprived of a con-

stitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged. The Fifth Circuit, 483 F.2d 778 (1973), agreed with the District Court that persons arrested pursuant to information filed by a state attorney were entitled to a preliminary hearing to determine probable cause for the arrest. The Court also held that misdemeanants were entitled to such a hearing unless they were out on bond or charged with violating a law carrying no possibility of pretrial incarceration.

ARGUMENT

I.

SHOULD THE COURT INTERVENE IN A STATE COURT PROSECUTION ABSENT A SHOWING OF BAD-FAITH OR HARASSMENT ON THE PART OF THE INSTITUTING OFFICIALS?

Since the arrestees will be held in custody for trial it is urged that a hearing is necessary to prevent this pre-trial incarceration without a determination of probable cause before a neutral magistrate. Abstention has been held inapplicable because it is not the *pending prosecution* which is being attacked but the detention prior to prosecution. It is argued that inadequate procedural determination was made of the basis for this detention, i.e. the probable cause that the arrestee committed the offense. The state

feels that this procedural by-pass of the traditional respect of this Court for non-intervention in the legitimate activities of the States has been too easily dismissed.

This Court has traditionally refused to give equitable relief by interfering with the enforcement of criminal laws by the states. Although the practice has not been declared an absolute rule, in order to effect a departure it is necessary to show irreparable injury. *Douglas v. City of Jeanette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943), at 164.

The judicial exception to the written provisions of the Anti-Injunction Statute, 28 USCA §2283, notes also the requirement that the individual about to be prosecuted in a State Court show that he will, if the State Court proceeding is not enjoined, suffer irreparable damages. *Younger v. Harris*, 91 S. Ct. 746, 401 U.S. 37, 27 L. Ed. 2d 669, (1971) at 750, citing *Ex Parte Young*. The requirement is that the injury be not only irreparable, but "both great and immediate". *Fenner v. Boykin*, 271 U.S. 240, 46 S.Ct. 492, 70 L. Ed. 927 (1926). Further the threat to plaintiff's federal rights must be one which cannot be eliminated by his defense of a single criminal prosecution. *Ex Parte Young*, supra, *Younger v. Harris*, supra. The situation in the present case is similar to that of *Douglas v. City of Jeanette*, 319 U.S. 157, 63 S. Ct. 877, 87 L. Ed. 1324 (1943) at 164:

> "It does not appear from the record that petitioners have been threatened with any injury

other than that incidental to every criminal proceeding brought lawfully and in good faith."

The special circumstances of *Dombrowski v. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed 2d 22 (1965), are not present in this case. In that instance the Court dealt with the particular injury, recognized as irreparable, above and beyond that associated with the defense of a single prosecution brought in good faith, regarding the substantial rights of freedom of expression and their suppression. In the case at bar, there is no contention in the Fifth Circuit decision that the prosecutions were brought in bad faith or to harass the individuals confined. Here the injury is solely "that incidental to every criminal proceeding brought lawfully and in good faith". *Douglas*, supra.

The Court has stated the proposition that if injunctive relief is inappropriate due to the absence of showing irreparable injury, declaratory relief ordinarily would not be proper to declare the state statute unconstitutional. *Samuels v. Mackell*, 91 S. Ct. 764, 401 U.S. 66, 27 L. Ed. 2d 688 (1971). *Becker v. Thompson*, 459 F. 2d 919 (5 Cir. 1972), cert. gr., sub nom *Steffel v. Thompson*, 410 U.S. 593, 93 S. Ct. 1424, 35 L. Ed. 2d 686 (1973). Therefore, where the state statutes involved are not applied in bad faith or to harass the defendants, and where there is an absence of a showing of irreparable injury to defendants, this Court has traditionally refused to intervene in a State Court criminal proceeding to declare such statutes unconstitutional, and such intervention should not be made in the case at bar.

II.

IS IT A CONSTITUTIONALLY MANDATED DUE PROCESS RIGHT FOR AN ARRESTEE IN CUSTODY TO BE AVAILED A PRELIMINARY HEARING BEFORE A NEUTRAL MAGISTRATE FOR A DETERMINATION OF PROBABLE CAUSE FOR ARREST, AFTER THE FILING OF AN INFORMATION BY A DISTRICT ATTORNEY?

The right as defined by *Pugh v. Rainwater*, would entitle all persons arrested pursuant to informations filed by a state attorney a hearing before a neutral magistrate to determine probable cause for the arrest. Misdemeanants would also be entitled to such a hearing unless they were out on bond or charged with violating a law carrying no possibility of pre-trial incarceration.

The state contends that this determination of probable cause before a neutral magistrate is not constitutionally mandated by the Fourth and Fourteenth Amendments to the Constitution of the United States. This Court has repeatedly held that the preliminary examination is not constitutionally mandated. "A preliminary examination is unknown to the common law and an accused is not entitled to such an examination, unless it is given him by constitutional or statutory provision." *Pearce v. Cox*, 354 F. 2d 884, 891; cert den. 86 S. Ct. 1869, 1871; 384 U.S. 976, 977; 16 L. Ed. 2d 685, 686. See also *Goldsby v. U.S.*, 160 U.S. 70, 16 S. Ct. 216, 40 L. Ed. 343 (1895), *Green v. Bomar*, 329 F.

2d 796 (6th Cir. 1964), *Corbett v. Patterson*, 272 F. Supp. 602 (1967), *People v. McCrea*, 6 N. W. 2d 489, 303 Mich. 213, cert. den. 63 S. Ct. 851, 318 U.S. 783, 87 L. Ed. 1150 (1942).

In discussing the necessity of a pre-trial conference prior to indictment in tax cases the Court in *U. S. v. Goldstein*, after dismissing an equal protection argument, stated: "Nor can it be asserted that a taxpayer is denied due process by the absence of a pre-indictment conference, *for his rights at trial will be fully protected.*" 342 F. Supp. 661, 666, (1972), emphasis supplied. And "Furthermore, the law is well settled that the due-process clauses of the Federal and State Constitutions do not require a preliminary examination in criminal proceedings." *People v. McCrea*, supra, at 502, and numerous cases cited therein, *Miller v. Anderson*, 352 F. Supp. 1263.

III.

IF THE COURT SHOULD DECLARE THE RULE ANNOUNCED IN *PUGH V. RAINWATER* TO BE CONSTITUTIONALLY MANDATED, THE APPLICATION OF THE DECREE SHOULD BE PROSPECTIVE ONLY.

The considerations for applying decisions expounding new constitutional rules affecting criminal trials retroactively or non-retroactively were established in *Linkletter v. Walker*, 381 U.S. 618, 629; 85 S. Ct. 1731, 1737; 14 L. Ed. 2d 60 and most recently summarized in *Stovall v. Denno*, 388 U.S. 293, 297; 87

S. Ct. 1967, 1970; 18 L. Ed. 2d. 1199, "The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standard."

There is strong support for prospectivity for a decision amplifying the requirements for a determination of probable cause before a neutral magistrate. The purpose here is to prevent a pretrial incarceration without first having a hearing before a neutral magistrate. The incarcerations in cases already prosecuted are now ended and there will be no purpose served in releasing convicted individuals who have received a full and fair trial and have been determined guilty prior to their present incarceration.

The preliminary hearing to determine probable cause is similar in purpose to that of the exclusionary rule, which is but a "procedural weapon that has no bearing on guilt" and, as in this case, "the fairness of the trial is not under attack". *Linkletter v. Walker*, supra, which gave the exclusionary rule only prospective application.

The purpose of the rule presently propounded is easily distinguished from that in *Adams v. Illinois*, 405 U.S. 278, 92 S. Ct. 916, 31 L. Ed. 2d 202 (1971), a situation where the "major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding func-

tion and so raises serious questions about the accuracy of guilty verdicts in past trials," as discussed in *Williams v. U. S.*, 401 U.S. 646, 653; 91 S. Ct. 1148, 1152; 28 L. Ed. 2d 388 (1971).

The decisions which have been given retroactive effect[1] have been based on the possibility of "unreliability or coercion". *Linkletter v. Walker*, supra.

The second consideration in determining retroactivity concerns the reliance by authorities on the old standards and the extent to which the new requirements were foreshadowed in the decisions of this Court. As illustrated by the numerous citations in the second argument, the rule presently considered was not intimated by prior decisions of this Court. *Desist v. U. S.*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969).

In considering the third requirement of *Linkletter*, supra, the effect on the administration of justice by retroactive application of the new standard would be substantial. It is to be noted that these latter two requirements have not been relied upon except where the purpose of the rule announced has not clearly favored either retroactivity or prospectivity. *De Stefano v. Woods*, 392 U.S. 631, 88 S. Ct. 2093, 20 L. Ed. 2d 1308; *Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199; *Johnson v. New Jersey*, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882.

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[1] *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799; *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891, *Cottle v. Wainwright*, 477 F. 2d 269 (1973).

The present decision should be implemented only with respect to its purported purpose and thus made applicable only to those prosecutions commenced without a preliminary hearing after the date of the original decision of *Pugh v. Rainwater*, *Stovall v. Denno*, supra.

CONCLUSION

The State of Louisiana respectfully requests that the Court hold for the appellant herein, for the aforementioned reasons.

Respectfully submitted,

WILLIAM J. GUSTE, JR.,
Attorney General,
State of Louisiana.

WALTER L. SMITH, JR.,
Assistant Attorney General,
State of Louisiana.

Attorneys for the
State of Louisiana,
Amicus Curiae.

WALTER L. SMITH, JR.,
1885 Wooddale Boulevard,
Suite 1010,
Baton Rouge, Louisiana 70806.

CERTIFICATE

I hereby certify that copies of the foregoing Original Brief Amicus Curiae For The State Of Louisiana have this date been served on Counsel of record for Appellant and Appellee by mailing same in the United States Mail, postage prepaid.

Baton Rouge, Louisiana, this 15th day of August, 1974.

WALTER L. SMITH, JR.,

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